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Nos. 07-21, 07-25

IN THE SUPREME COURT
OF THE UNITED STATES

WILLIAM CRAWFORD, ET AL., *Petitioners*

v.

MARION COUNTY ELECTION BOARD, ET AL., *Respondent*

INDIANA DEMOCRATIC PARTY, ET AL., *Petitioners*

v.

TODD ROKITA, ET AL., *Respondent*

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Affirmance

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

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INTEREST OF AMICUS CURIAE

All parties seem to agree that voting fraud can be addressed by appropriate legislation, but the parties differ on whether in-person voter fraud actually occurs. *Amicus* wishes to address this area, and present to the Court information which suggests that this problem is significant and growing.[1]

The American Unity Legal Defense Fund is an independent, national, non-profit educational organization dedicated to preserving our historical unity as Americans into the 21st Century. The American Unity Legal Defense Fund defends human and civil rights, including the rights of American citizens whose votes may be diluted by non-citizen voters. AULDF joined an *amici curiae* brief in *Mohawk Industries v. Williams*, No. 05-465 (brief of the Immigration Political Action Committee and five other organizations).

PRELIMINARY STATEMENT

This is a very strange – and dangerous – case. Petitioners and their supporters have marshaled enormous research and scholarly resources, hundreds of pages of briefing and numerous advocacy groups, all of which proclaim unanimity that "in-person voter impersonation fraud" – which

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[1]The parties have consented to the filing of amicus briefs in support of either party. Pursuant to Rule 37.6, *amicus* certifies that no person or entity other than *amicus* made a monetary contribution to the preparation and submission of this brief, and that no counsel to a party authored this brief in whole or in part.

they contend is the only problem addressed by the statute in question – "does not exist."

Yet, in a few days after reading the opening briefs, *amicus* here – who has no special expertise in this area, no history of involvement in this issue, and a minuscule amount of research resources – has uncovered several instances of clear, documented "in-person voter impersonation fraud" in the first city it examined. (That information is described *infra*.)

Amicus AULDF had intended to address only the significant and growing problem of non-citizen voting fraud and how the Indiana statute would likely help prevent or uncover that fraud. After reading the opening briefs, however, *amicus* expanded its research and quickly determined both that "in-person voter impersonation fraud" exists, and that the Indiana statute actually protects far more than addressed by the opening presentations.

Moreover, many of the briefs contain emotion, over-statement, exaggeration, hatred and bile, culminating, perhaps, in the absurd proposition that the Indiana statute must be struck down because an Arizona initiative proponent dislikes bilingual ballots, an opinion an advocacy group finds racist and abhorrent. Brief for *Amicus Curiae* Mexican American Legal Defense and Educational Fund In Support of Petitioners, at 11; *but see, Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997)(dismissing as moot a challenge to successful Arizona ballot initiative declaring English the official language). Thus, the opening presentations

which challenge the lower courts' finding that fraud exists apparently don't apply the same level of skepticism to claims that it does not.

The danger in this case is not just from the supposed evils depicted in the opening presentations. As shown by the monumental increase in the number of *amici* briefs in recent cases, briefers know the aphorism "whoever defines the terms of a debate, wins." This Court must guard also against incomplete and misleading arguments, particularly in a highly-controversial case, where the sheer volume of shouting may obscure flaws. Otherwise serious briefing may degenerate into blogosphere screaming in some of the most important cases.

SUMMARY OF ARGUMENT

The parties differ on whether "in-person voter impersonation fraud" exists. The lower courts found that election fraud existed and provided a sufficient basis for the challenged statute. Petitioners, on the other hand, contend that such fraud "does not exist" either in Indiana or elsewhere.

Yet, the 2004 elections in Albuquerque, New Mexico demonstrates both several actual incidents of "in-person voter impersonation fraud" which cost citizens their votes, and other forms of voter impersonation fraud. *Amicus* does not suggest that New Mexico or Albuquerque are hotbeds of election illegality; this was simply the first place *amicus* reviewed the available data.

Some Albuquerque frauds appear plainly in the case file in *Women Voters of Albuquerque/Bernalilo*

County, Inc., v. Santillanes, 506 F.Supp.2d 598 (D.N.M. 2007), *appeal pending*, No. 07-2067 (10th Cir. 2007), another challenge to voter identification requirements. In *Santillanes*, preliminary motions and congressional testimony reveal that Dwight Adkins had his vote impersonated; his vote was not counted because the impersonator had voted first. The same was true for Rosemary McGee, whose impersonator not only voted earlier, but mis-spelled her name. At least four other such impersonations were detected in that election.

Numerous other voter frauds were also detected in that election which could have resulted in voter impersonation frauds. Some included forgery, but others included changes in existing registration data, a pattern which has been repeated across the country. Again, these could have led to voter impersonation fraud. "In-person voter impersonation fraud" does exist.

One reason why Petitioners contend that such fraud "does not exist" is that they have chosen to define it away by counting only prosecuted cases or by ignoring other forms of voter fraud. As a result, Petitioners do not recognize the value of the challenged voter identification procedures in stopping actual or potential voter impersonations. Indiana had few other options to counter these forms of voter fraud, as evidence, such as Rosemary McGee's case, indicates that signature verification was not effective.

In addition, none of the opening presentations reflect the growing problem of non-citizen voting. Most observers discount the likelihood of non-citizen

voting, erroneously claiming there is no economic value in it. For illegal immigrants, however, voting records have a substantial value as evidence of employment eligibility; as the federal government has increased immigration enforcement, illegal immigrants are increasingly using identity theft crimes for these employment-related reasons.

More importantly, recent political efforts have led to a non-economic incentive for immigrants to participate in election-related activities: to increase political "clout" in hopes of achieving immigration law changes. "Today we march; tomorrow we vote" may be a laudable sentiment about increasing participation by recent citizens, but it also reflects troubling trends in non-citizen-related election frauds.

ARGUMENT

This case turns on perceptions. These perceptions have legal consequences. This Court has recently held that preventing election fraud is a compelling state interest, in part because of the effect on voters' rights. *Purcell v. Gonzalez*, __ U.S. ___, ___, 127 S.Ct. 5, 7 (2006). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Id.*, 127 S.Ct. at 7.

Justice Stevens noted that two significant issues in these voter identification cases will be "the

prevalence and character of the fraudulent practices that allegedly justify those requirements." *Purcell*, 127 S.Ct. at 8 (Stevens, J., concurring). These would seem to be the standard for review of at least part of this case, Yet, despite hundreds of pages of briefing, Petitioners and their supporters in this case simply assumed that they satisfied Justice Stevens' inquiry, when in fact, they had only defined away and dismissed those two questions.

For example, Petitioners acknowledge that voting fraud should be stopped. "States should and do play a key role in combating election fraud." Brief for Petitioners Indiana Democratic Party, *et al.* ("IDP Br."), at 42. "[C]ombating voting fraud is certainly a compelling governmental interest." Brief for Petitioners William Crawford, *et al.* ("Crawford Br."), at 46.

The decisions below determined that there was sufficient evidence of fraud in the record to support Indiana's legislative response. *See, e.g., Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 793-94 (S.D.In. 2006)(noting both instances of fraud and public perceptions of fraud which contributed to low confidence in elections); *Crawford v. Marion County Election Board*, 472 F.3d 949, 953-54 (7th Cir. 2007)("Some voter impersonation has been found (though not much, for remember that it is difficult to detect)").

Petitioners attack these findings as totally groundless. "But that is pure conjecture, as there is no evidence whatsoever that a single person in Indiana has ever come to the polls on Election Day and tried to vote under the name of a person who

already had voted." IDP Br., at 43. "Here, the problem cited by the State simply does not exist, and the State has offered nothing but speculation and conjecture regarding the harm it allegedly seeks to prevent." IDP Br., at 44 (emphasis added). "[A] problem – in-person impersonation voting fraud – that does not exist and cannot be rationally feared given the general lack of evidence concerning the existence of such fraud." Crawford Br., at 48, 53 (emphasis added).

Note that the disagreement goes beyond just whether the Seventh Circuit's analysis was correct about the situation in Indiana. Petitioners and their supporters assert that in-person voter fraud does not occur ANYWHERE – that it "does not exist."

Respondents, on the other hand, contend that election fraud is significant. "As documented by the district court, voter fraud is a problem of disturbing prevalence around the country." Brief of State Respondents In Opposition to the Petition ("Opp."), at 2, *citing* Pet. App. 40-41.

Any "does not exist" standard is very hard to justify, and the public record indicates that the "does not exist" standard here is unsustainable.

I. "IN-PERSON VOTER IMPERSONATION FRAUD" DOES EXIST.

Petitioners, for example, assert that "there is no evidence whatsoever that a single person in Indiana has ever come to the polls on Election Day and tried to vote under the name of a person who already had voted." IBP Br., at 43. Perhaps that is true about evidence in Indiana, "for remember that it is difficult

to detect." *Crawford*, 472 F.3d at 954. It is not true elsewhere, where voter impersonation is a matter of public record.

The Seventh Circuit said that voter impersonation would be likely detected when "the impersonated person . . . voted already when the impersonator arrived and tried to vote in his name." 472 F.3d at 953. This is not the only way in which voter impersonation could be detected, and likely represents a lesser concern because the real vote itself might not be lost.

In fact, a more troubling version happened – repeatedly – in Albuquerque, New Mexico, in 2004: the impersonated, "real" persons arrived and could not vote after the impersonators had voted earlier. The difference between the two detection methods is that, in Albuquerque, the miscreants were long gone, and the votes cast by the actual voter were not counted. There could be no prosecution, but the harm to the individual voter victims is apparent.

Amicus does not suggest that Albuquerque and New Mexico are particularly prone to election fraud. This is simply the first place *amicus* applied its limited research resources to the available cases.

Both Petitioners cite in passing *Women Voters of Albuquerque/Bernalilo County, Inc., v. Santillanes*, 506 F.Supp.2d 598 (D.N.M. 2007), *appeal pending*, No. 07-2067 (10th Cir. 2007).[2] Crawford Br., at 48;

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[2] *Santillanes* involves the same issue as this case – the constitutionality of a voter identification requirement – and Judge Armijo distinguished the lower court opinions here in

(continued...)

IDP Br., at 49. Petitioners cite *Santillanes* for the proposition that voter impersonation does not exist. *Id.* Yet at least one clear instance of voter impersonation is referenced in *Santillanes*, but the opinion must be supplemented to disclose the impersonation.

Judge Armijo noted in *Santillanes* that "[w]ith respect to the City's narrower interest in preventing people from impersonating another voter at the polls in order to steal their vote, there is no admissible evidence in the record that such voter impersonation fraud has occurred with any frequency in past municipal elections." 506 F.Supp.2d at 637 (emphasis added). She did note that the ordinance in that case was stimulated, at least in part, by reports of such fraud in the 2004 Presidential election, but said that the details of such reports had not been presented to her. *Id.*

One reason for the lack of "evidence in the record" is that Judge Armijo did not permit such evidence to be presented to her. In Footnote 3 of the decision, Judge Armijo notes that she denied a motion to intervene by, *inter alia*, Dwight Adkins. 506 F.Supp.2d at 608 n. 3. In her unpublished memorandum opinion denying intervention, Judge Armijo found that the intervention motion was not filed timely. *American Civil Liberties Union of New*

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[2](...continued)
striking down a city's voter ID requirement. 506 F.Supp.2d at 638.

Mexico v. Santillanes, No. 1:05-cv-01136-MCA-WDS, Doc. 42, slip op., at 11 (D.N.M., July 12, 2006).[3]

Judge Armijo's decision notes only that Dwight Adkins, one of the individuals who moved to intervene, "claims he was deprived of his vote in 2004." *Id.*, at 7. In his Motion to Intervene, however, Mr. Adkins stated that "[i]n the 2004 election, his vote was stolen by someone who voted in his place. Mr. Adkins was 'allowed' to cast a provisional ballot, but he was informed that it was not counted." *Santillanes*, No. 1:05-cv-01136-MCA-WDS, Doc. 33, at 3 (D.N.M. June 13, 2006).

More detail is available in Congressional testimony. A few days after filing his Motion to Intervene, Mr. Adkins's counsel explained to the Committee on House Administration that Mr. Adkins sought to intervene because "[h]e was not allowed to vote when he appeared at his polling place because someone had voted fraudulently in his place. His 'provisional ballot' was cast and denied on the basis, he was told, that he had already voted. Rosemary McGee of Albuquerque suffered the same fate." Comm. on House Administration, *Testimony of Mr. Patrick Rogers*, June 22, 2006, *available at* http://cha.house.gov/index.php?option=com_content &

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[3]Curiously, this motion and Order do not appear in the comprehensive listing of case materials made publicly available by the Moritz School of Law at The Ohio State University. *See, e.g.*, http://moritzlaw.osu.edu/electionlaw/litigation/aclunewmexico.php. They are available, however, through PACER.

task=view&id=75&Itemid=41.

Mrs. Vicki Perea, a former Albuquerque City Council member, also testified: "Rosemary McGee is a Bernalillo County voter who tried to vote on Election Day in 2004, only to find that someone else had signed the voting roster in her place earlier in the day (and spelled her name wrong)." Comm. on House Administration, *Testimony of Mrs. Vicki Perea*, June 22, 2006, *available at* http://cha.house.gov/index.php?option=com_content &task=view&id=102&Itemid=41. Mrs. Perea showed the voting roster to the Committee: "You can see the voting roster on this slide, with Rosemary's actual signature on the bottom, and the signature of the person who voted in her place at the top." *Id.*

Another report indicates that Ms. McGee appeared at the polling place at 3:00PM and found that the impersonator had voted at 7:00AM the same day. Prof. John Lott, "John Fund on the Voting Process in New Mexico," November 10, 2004, available at http://johnrlott.blogspot.com/2004/11/john-fund-on-voting-process-in-new.html. The time is important, because under New Mexico rules, the earlier, impostor's vote was counted, not the later "real" vote. *Id.*

It is also important to note that not only were the signatures visibly different, but the voter's name was mis-spelled. Whatever safeguards were in place to protect against impersonation did not work.

Nor were Mr. Adkins and Ms. McGee the only persons whose votes were physically impersonated by in-person fraud that day; at least four other

Albuquerque voters were impersonated. Vickie Perea, "Candidate for State Treasurer," *Albuquerque Tribune*, October 10, 2006, *available at* http://www.abqtrib.com/news/2006/oct/10/vickie-perea-republican/. These were just the frauds which were detected, and all these detections were after the fact. No prosecutions resulted.

This was not the only type of election fraud which occurred in that election. A closely-related type of fraud, for example, involves changes in a voter's registration form, including forgery or simply changing the address or other information on the file. Thus, an impersonator would not easily be detected, unless and until the impersonated person attempted to vote.

The Albuquerque election had some of these other types of election fraud. *See, e.g.*, Christopher Drew and Eric Lipton, "G.O.P. Anger in Swing State Eased Attorney's Exit," *The New York Times*, March 18, 2007, *available at* http://www.nytimes.com/2007/03/18/washington/18attorneys.html?_r=1&oref=slogin; Perea, *supra*; Lott, *supra*.

Some of these incidents involve outright forgery of ballot materials. Diane Taylor, for example, was convicted of vote fraud for simply forging voter registrations in the name of her three teenage children. KRQE-TV 13, "Rep. Pearce Mingles with Vote Fraud Figure," September 2007, *available at*: http://www.krqe.com/Global/story.asp?S=7113367 Had Taylor received the absentee ballots she requested, she likely would have voted them in an instance of voter impersonation, but it appears that

Mrs. Taylor was caught before voting. Nevertheless, her fraud was classed as voting registration-related because it was caught before she actually cast her sons' absentee ballots.

But other similar child impersonations in Albuquerque could easily have led to undetectable in-person voting fraud similar to that which affected the six voters described above. "The first whiff of something suspicious came when a 15-year-old boy received a voter registration card in the mail. Soon a second one arrived. Then his 13-year-old neighbor got one, too. Neither boy had applied for the cards, and it looked as if their signatures and birthdates had been forged." Drew and Lipton, *supra*. "Local election officials said the cards sent to the two teenage boys were among about 3,000 faulty registrations, with some most likely resulting from mistakes and others raising more questions." *Id.*

This voter (or, in this case, non-voter) impersonation fraud would likely not have been detected by conventional means, since the children would not go to the polling place, and there would be no discrepancy between signatures on the registration and the voting roll. There would have been little or no risk of detection if the same fraudulent voter didn't go to the same polling place too frequently.

"In counting the first 5,000 provisional ballots in Bernalillo County, observers turned up 53 instances of individuals voting more than once." Lott, *supra*. "Double voting appears to fall into two categories: voters who themselves may have voted multiple times, and those whose votes were essentially

stolen." *Id.* This is an "error" rate in provisional ballots of more than one per cent. This error rate is significant in a state of over a million registered voters, but where George W. Bush lost the Presidential contest to Al Gore by 366 votes in 2000. Drew & Lipton, *supra.*

This type of impersonation has occurred recently in other elections. On October 25, 2006, United Press International reported that "[h]undreds of bogus address changes have surfaced near St. Louis and the election board is warning voters to make sure they get a polling-place notification card. If the card does not show up, a voter's address may have been fraudulently changed, the county elections director said." UPI, "Bogus voter-address changes in St. Louis," Oct. 25, 2006, *available* at http://www.upi.com/NewsTrack/Top_News/2006/10/25/bogus_voteraddress_changes_in_st_louis/3201. "Tom Stanislawski registered to vote six years ago. But this summer, someone signed him up again and changed his party affiliation. 'My concern would be I'd walk in November 2nd and be unable to vote,' he said." Hang Right Politics, "The ACORN doesn't fall far from the tree," Oct. 26, 2006, available at: http://hangrightpolitics.com/2006/10/26/the-acorn-doesnt-fall-far-from-the-tree/.

Some might argue that these were mere administrative errors and that impersonations did not "occur[] with any frequency in past municipal elections." *Santillanes*, 506 F.Supp.2d at 637. Nevertheless, the Seventh Circuit's analysis – that such crimes do occur but are hard to detect – seems to be borne out by the public record in at least some

places. Even worse, the flawed belief that voter impersonation "does not exist" may have other consequences, including, for example, insufficient attention to activities which could increase the risk of voter impersonation and other fraudulent activities, as shown in more detail below. Petitioners' "does not exist" standard is flawed.

II. VOTER FRAUD SHOULD NOT BE DEFINED AWAY.

If it seems odd that *amicus* in this brief could rapidly uncover repeated instances of voter impersonation fraud said not to "exist," the answer may lie in the very restrictive definitions used by Petitioners. Petitioners define away voter fraud in two ways: first, by arguing that only "in-person voter impersonation fraud" is affected by the voter identification requirement; and then by only considering those instances in which there was a prosecution. Such an approach would necessarily demonstrate less fraud than a broader analysis.[4]

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[4]Perhaps Petitioners and their supporters recognize the failure of their "does not exist" standard, as several of their claims hedge their bets. In Crawford's Reply Brief at the petition stage, for example, he said: "Nineteen of these 24 convictions [at the federal level between 2000 and 2005] were not because of any impersonation fraud." Reply Brief for Petitioners in No. 07-21, at 2. "Nor was there any credible evidence inside or outside the record that impersonation voter fraud is a serious problem in this country. Brief of *Amicus Curiae* Professor Richard L. Hasen in Support of Petitioners ("Hasen Br."), at 29 (emphasis added). "A New York Times

(continued...)

"Anyone who wants to corrupt election outcomes has far better options than pretending to be someone else at the polls. At best, such a voter-impersonation scheme might net a few illegal votes as the impersonator travels from precinct to precinct." IDP Br., at 43. In other words, Petitioners suggest the only type of fraud which should be considered in this case is identified by the following steps:

> [E]ach impersonator ostensibly would have to: (i) memorize the name and other identifying information of a registered voter; (ii) learn to mimic the voter's signature; (iii) travel to the appropriate polling precinct site for the particular voter; (iv) wait in line at the polling place to cast a ballot in that voter's name; (v) ensure that the registered voter has not already voted at the polls; and (vi) risk detection by a poll worker who may know the registered voter.

Brief for the Lawyer's Committee for Civil Rights Under Law, [*et al.*] as *Amici Curiae* In Support of Petitioners, at 10. To successfully carry out such a fraud, an organization might need "an army of

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[4](...continued)

analysis of efforts of the Justice Department over five years . . . revealed . . . no systematic evidence of the kind of impersonation voter fraud that would support the need for a voter identification law." Id., at 32 (emphasis added).

This type of hedging language is an indication of restrictive analysis. Given the massive resources poured into the opening presentations and in light of the ease with which actual incidents of in-person voter impersonation fraud were uncovered here, a broader analysis could have been presented.

individual impersonators in order to generate a meaningful number of votes." *Id.*

As the Albuquerque example shows, just this sort of activity does occur. At least six voters tried to vote and found that their votes had already been impersonated. The impersonated votes were cast by someone with sufficient knowledge of the rules to know that the votes had to be cast at 7AM, but not sufficient intelligence to spell Ms. McGee's name correctly. There appeared to be no need to "mimic the voter's signature." Beyond that, we know only that election officials were unable to catch the impersonators from the signature mis-match and the mis-spelled name.

We don't know how many additional persons were impersonated. This is the definitional flaw in Petitioners' analysis: "voter impersonation" is most effective and undetectable when coupled with other forms of voter fraud, which Petitioners would not count because that portion of the fraud doesn't include an appearance at the polling place. Yet it is just that type of coordinated fraud which is common in American elections.

A) Voter Fraud Covered By the Challenged Statute Is Broader Than Defined by Petitioners:

In June 2006, Francine Busby lost the special election to replace convicted Cong. Randy "Duke" Cunningham (R-CA) in part because she was seen to have encouraged voting by illegal immigrants. "At the end of the event, a man asked Busby a question in Spanish, which was translated for her: 'I want to help, but I don't have papers.' Busby responded:

'Everybody can help, yeah, absolutely, you can all help. You don't need papers for voting, you don't need to be a registered voter to help.'" John Gizzi, "GOP Moderate Scrapes by After Democrat Panders to Illegals," *Human Events*, June 12, 2006, *available at:* www.humanevents.com/article.php?print+yes&id=15479. Busby argued that she misspoke, but observers noted "those remarks really hurt Busby." *Id.*

Note that it is not just Busby's encouragement which is remarkable. What is equally important, in the context of this case, is that an illegal immigrant wanted "to help." As discussed in more detail below, immigrants are increasingly likely to want to participate, legally or not, in the American political system. It is not just an "army" of miscreants who could affect elections, but increasing numbers of those who, even for benign reasons, "want to help."

Under the *Purcell* standard, even "benign" election fraud can affect legitimacy. As Francine Busby discovered, being seen to have encouraged "help" from illegal immigrants may have an effect on voters, but counting on candidate public mis-steps is not a substitute for enforcing election safeguards.

Nevertheless, such encouragement is not only continuing, it spreads from the highest federal officials. On the weekend before the November 2000 elections, the California Democratic Party mailed hundreds of thousands of fake "Voter Identification Cards" to lists which included non-citizens. Julie Foster, "Non-citizens vote with 'Clinton card'?" WorldNet Daily, November 7, 2000, *available at* www.worldnetdaily.com/news/printer-

friendly.asp?ARTICLE_ID=18000. The cards were accompanied by a letter signed by then-President Bill Clinton, who exhorted recipients to vote. *Id.*

The Clinton letter included a postscript, just below President Clinton's signature, which read: "Here is your personal Voter Identification Card. Sign your name, then detach your card. Bring your card with you to your polling place on Election Day. It will help your voting go more smoothly." *Id.* A copy of the Clinton letter can be found at: http://www.worldnetdaily.com/images/20001106_Clintonltr.jpg.

The "Clinton card" episode did not elicit significant media coverage, perhaps because it was eclipsed by larger news from the 2000 Presidential Election. *See., e.g., Bush v. Gore*, 531 U.S. 98 (2000).

A more contentious example was in the 1996 election in California's 46th Congressional District. Comm. on House Oversight, "Dismissing the Election Contest Against Loretta Sanchez," H. Rpt. 105-416. In that election, Loretta Sanchez defeated incumbent Robert Dornan by only 979 votes. *Id.*, at 15. A congressional investigation found "significant vote fraud and vote irregularities." *Id.*, at 16. The Committee determined that the number of non-citizen and other illegal votes uncovered by the investigation was not as large as Sanchez's margin of victory, so the election challenge was dismissed. *Id.*

An advocacy group was alleged to have encouraged illegal voter registration, and, in this case, voting. *Id.*, at 3. The Orange County, California, District Attorney found that 61% of the

voter registrations by the advocacy group, Hermandad Mexicano Nacional, were illegal. *Id.*, at 337. In addition, the California Secretary of State determined that 303 non-citizens registered by the group had voted in the disputed election. *Id.*, at 19, 337.

The organization admitted having registered illegal immigrants. PBS Online Newshour, "Contested Contest," *Online Focus*, October 22, 1997, *available at*: www.pbs.org/newshour/bb/congress/july-dec97/dornan_10-22.html ("And Lopez of Hemandad Mexicana admits his group registered non-citizens."). The organization contended "Republicans are trying to destroy the organization because of its success in signing up new citizens." *Id.* There was no prosecution.

Unfortunately, these are not isolated concerns about rare registration fraud, but are similar to surprisingly common allegations of fraudulent incidents nationwide. Some allegations of election fraud in Albuquerque, for example, were linked to an advocacy group, the Association of Community Organizations for Reform Now ("ACORN"). *Id.* New Mexico Secretary of State Rebecca Vigil-Giron exempted ACORN-gathered voter registrations from otherwise-mandatory identification requirements. John Fund, "Ballots or Briefs?; In 2004, the Man With the Most Lawyers May Win," *The Wall St. Journal*, Sept. 22, 2004, *available* at http://www.opinionjournal.com/diary/?id=110005654. "Similar allegations have been made in Pennsylvania, Ohio and Colorado, though no charges

have been filed." Fox News.com, "ACORN Accused of Bogus Forms in Mo.," *available* at http://www.foxnews.com/wires/2006Oct25/0,4670, VoterRegistrationQuestions,00.html.

The reports of ACORN-related election fraud are numerous, and continuing. "Three of seven defendants in the biggest voter-registration fraud scheme in Washington history have pleaded guilty and one has been sentenced, prosecutors said Monday. . . . The defendants were all temporary employees of ACORN." Keith Ervin, "Three Plead Guilty in Fake Voter Scheme," *Seattle Times*, October 30, 2007, *available at* http://seattletimes.nwsource.com/html/localnews/200 3982533_acorn30m.html?syndication=rss. "Federal indictments allege the four turned in false voter registration applications. Prosecutors said the indictments are part of a national investigation," KMBC-TV, "ACORN Workers Indicted on Alleged Voter Fraud," Kansas City, Missouri, Nov. 1, 2006, *available at:* http://www.kmbc.com/politics/10214492/detail.html,

ACORN, which filed a brief *amicus curiae* in this case, contends that such charges are baseless. Brief of the Association of Community Organizations for Reform Now as *Amicus Curiae* in Support of Petitioners ("ACORN Br."), at 6. ACORN's supporters agree: "One year after the contentious 2004 election, it is clear that politically motivated law firms and organizations leveled unfounded allegations of fraud against ACORN with the goal of tarnishing the community group's reputation and inhibiting its work." Project Vote, "One Year Later:

Results of 2004 Voter Fraud Investigations Give Vote Groups a Clean Bill of Health," December 14, 2005, *available at* http://www.commondreams.org/news2005/1214-09.htm.

Neither the ACORN brief, nor its supporters at Project Vote (which also joined in a brief *amici curiae* in this case), addressed the guilty pleas in Washington State. Ervin, *supra*. Nor did the ACORN or Project Vote briefs discuss the New Mexico problems described above. And the ACORN and Project Vote briefs did not discuss the enabling effect of voter registration fraud on voter impersonation. Neither did any other opening briefs. Yet all three of these problems both exist and were well-publicized.

Whether or not ACORN or other groups were actually involved in voter registration fraud, the existence of such widespread and consistent allegations, admissions, and criminal pleas over a long period of time indicate that fears of voter fraud are not groundless, and that public perceptions must be considered. *Purcell*, 127 S.Ct. at 8. As Mr. Adkins' experience shows, some voters have been deprived of their votes by someone who voted in their names.

Widespread voter registration fraud is not, as the Petitioners suggest, utterly divorced from voter impersonation fraud. Indeed, the alleged voter registration schemes could lead to massive voter impersonation fraud, especially if coupled with individual identification fraud.

Unfortunately, individual identification fraud is also rampant and growing. "The prevalence of identity theft is growing." General Accounting Office,

"Identity Fraud: Prevalence and Links to Alien Illegal Activities." GAO-02-830T, June 25, 2002, at 1.

The ACORN and other reports of voter fraud receive widespread coverage, and would tend to undercut voter confidence. *Purcell*, 127 U.S. at 7. It is not unreasonable for Indiana to want to avoid both the actual voter fraud caused by impersonation and the loss of citizen confidence which accompanies the media coverage of such fraud.

B) The Lack of Prosecution Does Not Mean the Lack of Fraud:

Besides defining away the problem of voter impersonation, the petitioners and their supporting commentators are using flawed and limited analyses of voting fraud. Their analyses discounting voting fraud are largely based on prosecutions brought and won. *See., e.g.*, Hasen Br., at 32 ("only 86 successful prosecutions" over five years); IDP Br., at 43 ("no one in Indiana . . . been prosecuted for impersonating a registered voter")(citation omitted); *id.*, at 48 ("Not a single one of the convictions detailed in the DOJ report involved in-person voter-impersonation fraud.") (emphasis added).

These analyses are based principally on three sources: a report prepared by Lorraine C. Minnite for Project Vote, the organization supporting ACORN quoted above, Lorraine C. Minnite, Ph.D., *The Politics of Voter Fraud*, PROJECT VOTE, at 3 (2007) ("Minnite"), available at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf; a brief *amicus curiae* prepared by the Brennan Center for

Justice at NYU Law School for the lower court,[5] *available at:* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Rokita-BCJBr_000.pdf; and, a *New York Times* article. Eric Lipton and Ian Urbina, "In 5-year Effort, Scant Evidence of Voter Fraud," *The New York Times*, April 12, 2007, available at http://www.nytimes.com/2007/04/12/washington/12fraud.html?_r=1&oref=slogin.

None of these three sources discuss the New Mexico or other voting frauds discussed above. It is unknown what other omissions endanger their analyses, but these three sources also discount allegations of voter fraud either by redefining it or by limiting them to law enforcement reports.

For example, Minnite scoffs at reports that law enforcement agencies fail to undertake prosecutions. "It is difficult to conceive of whole categories of criminal behavior that go almost completely undetected or ignored by law enforcement officials." *Id,* at 11. Yet, that is exactly what happens in some categories of the law, such as immigration law enforcement, as was amply documented in the *amici curiae* brief filed by the AULDF, CAU, and other

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[5]These first two sources have been supplemented by a brief *amici curiae* here, on behalf of Brennan Center, Minnite, Project Vote and others. Brief of *Amici Curiae* the Brennan Center for Justice; [*et al.*] in Support of Petitioners. The two Brennan Center briefs are similar in content, and the new brief is discussed jointly with the older brief, as neither contains a discussion of either the New Mexico situation or the methodological flaws discussed herein.

organizations in *Mohawk Industries v. Williams*, No. 05-465 (brief of the Immigration Political Action Committee and five other organizations).

Given the California non-citizen voting identified in 1996, H. Rpt. 105-416, at 337, the lack of immigration law enforcement is significant, since, in the context of prosecutions for vote fraud, the same propensity to ignore crimes seems to recur. "Another [U.S. Attorney] office reported that they declined to prosecute a number of investigations (number not tracked) that involved aliens who registered to vote. Rather than prosecute, they allowed administrative procedures regarding deportation to occur." GAO-05-478, at 60.

Similarly, the House Committee on House Oversight reported in 1998 that the Immigration and Naturalization Service was unwilling to assist in investigating fraud by non-citizens in the 1996 elections. H. Rpt. 105-416, at 88, and n. 79.

In California, the House Oversight Committee reported, the Orange County District Attorney failed to obtain indictments, even though his investigation demonstrated huge amounts of vote fraud, including that 61% of an advocacy group's voter registrations were "illegal." *Id.*, at 337. The Secretary of State determined that 442 non-citizens voted in the disputed 1996 election, but no prosecutions appeared. *Id.*, at 338. A grand jury refused to issue indictments for the "several individuals who coordinated the Hermandad Mexicano Nacional voter registration effort. At least one witness who had worked for Hermandad fled to Mexico early in 1997, making the investigation more difficult." *Id.*,

at 337. All this even though the head of Hermandad Mexicano Nacional admitted registering non-citizens. PBS Online Newshour, *supra.*

Nor do any prosecutions appear to have been undertaken in New Mexico, despite the voter impersonation appearing in the public record. In fact, the lack of prosecutions appears to have become a political controversy in other areas. Drew and Lipton, *supra* (detailing then-U.S. Attorney David Iglesias's discussions with the Department of Justice over whether to prosecute various alleged election frauds in New Mexico).

The central reason why prosecutors do not address these forms of election fraud is not hidden. The legal test is whether there was an intent to influence the election, and such an intent is almost impossible to prove. "BILL JONES, CALIFORNIA'S SECRETARY OF STATE: "We are seeking to deal with . . . whether or not there was an intent to defraud in the case of the individuals there who either voted or participated in that process or not because you always have to prove intent." PBS Online Newshour, *supra.*.

Curiously, former U.S. Attorney David Iglesias's description of why he could not charge one ACORN worker with election fraud is illustrative of a new and growing trend: she didn't do it to influence the election – she did it "for the money." Drew and Lipton, *supra.* Absent a provable intent to influence an election, some admissions are not recorded as election fraud.

As shown below, the same is increasingly true of illegal immigrants' theft of legitimate identities.

Coupled with the traditional reluctance to enforce election laws against immigrants shown *infra*, this requirement will likely mean no prosecutions of aliens involved in election fraud at a time when immigration to the United States is at an all-time high.

These cases do not appear in the Petitioners' or their supporters' briefs. Nor do they appear in the three sources substantiating the Petitioners' "does not exist" argument.

Thus, in this case, where the information is both hidden and unlikely to be presented in an indictment, the lack of prosecutions cannot be equated with a lack of existence. The "does not exist" argument underlying Petitioners' analyses is likely over-stated.

III. INDIANA HAS NO OTHER REALISTIC OPTION TO PREVENT THESE FRAUDS

The in-person election fraud reported above could be minimized by a voter identification requirement. Ms. McGee's impostor, who didn't even know how to spell her name, could have been stopped if required to show identification. The same with Mr. Adkins' impostor and the other four impostors.

The third major flaw in Petitioners' position, however, is to think that this is the only sort of fraud which could be stopped or prevented by an identification requirement. As shown by the voter registration fraud examples above, a significant portion of that type of fraud may evade current application safeguards. Identification at the polls would keep, for example, persons who don't know

how to spell Ms. McGee's name from voting in her name, even if they diverted her voting registration to the wrong address, as was alleged in St. Louis.

The identification requirement adds another layer of difficulty to voter registration frauds, as the person who diverts the voter registration information, for example, would also have to generate a new, compliant identification card. A "Clinton card" would not be sufficient.

Illegal immigrants who "want to help," as in the Busby campaign, would not get the employment benefit of a voting receipt. The alien would have more difficulty in obtaining a higher-quality identification document to steal a voter's identity for employment purposes (*see, infra*).

Petitioners suggest that signature verification would be a viable alternative. "The plain fact is that the system of signature verification used for many decades, backed up by state and federal criminal penalties punishing fraudulent voting, worked extraordinarily well to prevent in-person voter fraud." IDP Br., at 42.

Unfortunately, as shown above, signature verification was ineffective in Albuquerque. As demonstrated to the Committee on House Administration, Ms. McGee's impostor simply signed, voted and ran. "You can see the voting roster on this slide, with Rosemary's actual signature on the bottom, and the signature of the person who voted in her place at the top." *Testimony of Mrs. Vicki Perea, supra.*

And signature verification would not be effective when voter impersonation is coupled with voter

registration fraud. "Tom Stanislawski registered to vote six years ago. But this summer, someone signed him up again and changed his party affiliation." Hang Right Politics, *supra*. This type of fraud would be undetectable without voter identification, and, if the reports of thousands of erroneous voter registrations are credible, an organized scheme combining registration and in-person fraud could lead to sufficient votes to tip a close election.

In a case fraught with partisan overtones, it is important to look at what observers were saying before the issue became polarized. The Democratic members of the Committee on House Administration issued a minority report on the disputed 1996 election which took issue with much of the majority's findings, but they also said:

> We use the word *may* quite deliberately here because short of an actual face-to-face interview with the suspect voter, nothing can be concluded about a suspect's citizenship status and right to vote in the State of California from all the materials the Majority demanded from Orange County and INS. Even *probable signature matches* between Orange County registration ballots and INS records, which the Minority used to reach its estimate, while perhaps the most reliable indication of a match, do not constitute proof.

H. Rpt. 105-416, at 1043.

Given the difference in definitions and perspectives, it is clear that Petitioners and their supporters do not agree that voting fraud is a significant problem. That difference, however, is not

an automatic bar to the Respondents' legislation and enforcement.

Given the broader scope and nature of the voting fraud problem addressed by the Indiana statute, it can't be said that there is no problem or that it is just a minor problem. The trends, particularly given immigrants' increasing motivations to vote, properly or not, are not encouraging.

IV. THIS PROBLEM WILL LIKELY GET WORSE, AS VOTING FRAUD BY NON-CITIZENS IS A SPECIAL, AND GROWING PROBLEM.

Cases and reports over many years indicate that non-citizens have voted illegally across the country. In 1954, for example, the Senate Committee on Rules and Administration noted that illegal immigrants had voted in the 1952 New Mexico Senate election. Committee on Rules and Administration, Report of the Subcommittee on Privileges and Elections, 83rd Congress, 2nd Session, "General Findings and Conclusions," at 1, U.S.G.P.O. Wash. 1954.

These problems continue. Petitioners themselves disclose a report noting 19 convictions between 2002 and 2005 "because the voters were not eligible to vote, either because they were convicted felons or non-citizens." Reply Brief for Petitioners Crawford, *et al.*, at 2, *citing* Minnite, *supra.* In *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir., 2007), the Ninth Circuit noted that the record in that case "indicates that, between 1996 and the present, as many as 232 non-citizens tried to register to vote and that the

State prosecuted ten of those 232 alleged non-citizens." 485 F.3d at 1048. In *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir, 2007), the Eleventh Circuit upheld the conviction of a Jamaican citizen who voted in the 2000 Presidential election. In *Simmons v. Jones*, 838 S.W.2d 298, 299 (Tex. App. 1992), the Court of Appeals of Texas, El Paso, reported that "Simmons lost one vote because one person voted for him who was not a citizen of the United States."

In 2005, the Government Accountability Office reported that, from January 2001 to May 2004, "In California, the only state with an investigative unit dedicated to voter fraud issues. . . the California investigative unit opened for investigation 29 allegations of non-citizens either registering or voting." Govt. Accountability Off., "Elections: Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists," GAO-05-478, June 10, 2005, at 59, App. III. During the same period, GAO reported that "[a]t the federal level, DOJ attorneys initiated at least 61 election fraud investigations or matters; of those cases, 15 involved voter registration or ineligible voters." *Id.*

Earlier, the Committee on House Oversight calculated 748 invalid votes in a disputed 1996 contest in the 46th Congressional District of California. H. Rpt. 105-416, at 15 ("In total, the Task Force found clear and convincing evidence that 748 invalid votes were cast in this election."). Because that number was less than the margin of victory, the Committee dismissed the election challenge. *Id.*

It is important to note that the Committee only counted the illegal votes of "documented" immigrants, not illegal immigrants like the one who wanted to "help" Francine Busby in San Diego last year. The Committee noted "a serious question and a troubling hypothesis: if there is a significant number of 'documented aliens', aliens in INS records, on the Orange County voter registration rolls, how many illegal or undocumented aliens may be registered to vote in Orange County? The Task Force can make no conclusion based on the materials before it." *Id.* In other words, had enough illegal immigrants, whose votes were undetectable by the House Committee, also voted, would that have changed the Committee's conclusions? It could not say, but is troubled by the possibility.

Some observers suggest that voting fraud by non-citizens does not occur because there is no economic incentive for them to vote and there are substantial penalties if they are discovered. "Critics say independent research shows that illegal immigrants do not vote. [Luis] Figueroa said undocumented immigrants have no motivation to vote illegally because voting would jeopardize their chances of acquiring citizenship." Juan Castillo, "Vote ID debate replete with drama, but is voter fraud an urgent problem?" *Austin American-Statesman*, May 23, 2007, *available* at http://www.statesman.com/search/content/region/legislature/stories/05/23/23voterid.html. *Compare*, *Sure-Tan , Inc., v. Nat'l Labor Relations Board*, 467 U.S. 883, 887 (1984)(six of seven voters in union election were illegal immigrants).

This assumption does not appear to be well-grounded in modern immigration and employment law. *See, e.g.*, 8 C.F.R. § 274a.2 (making a voter registration card an acceptable document for employment verification). "Nevertheless, the [Federal Election Commission] officials noted that non-citizens may be encouraged to register to vote because the I-9 form used to provide proof of employment eligibility and its implementing regulations includes, among other documents, the voter registration card as an acceptable document for employment identity purposes." GAO-05-478, *supra*, at 17.

Modern illegal immigrants are often familiar with impersonation and similar fraudulent tactics. Ironically, so-called "undocumented" aliens tend to be involved in substantial amounts of document and identity theft. "The prevalence of identity theft appears to be growing." Government Accountability Office, "Identity Fraud: Prevalence and Links to Alien Illegal Activities." GAO-02-830T, June 25, 2002, at 1, 3. "Though most people think of identity theft as a financial crime, one of the most common forms involves illegal immigrants using fraudulent Social Security numbers to conduct their daily lives." John Leland, "Some ID Theft Is Not for Profit, but to Get a Job," *The New York Times*, September 4, 2006, A1, *available at* http://www.nytimes.com/2006/09/04/us/04theft.html.

Federal law enforcement officials have recently focused new resources on attacking identity theft by illegal immigrants. Spencer S. Hsu and Krissah Williams, "Illegal Workers Arrested in 6-State ID

Theft Sweep," *The Washington Post*, December 13, 2006, A01 ("U.S. authorities cast the 11-month investigation as an attack on identity theft, not on typical immigration violations.").

There is little discussion, however, of a new and growing non-economic incentive for non-citizen voting fraud: wielding political power. As Congress discussed immigration legislation over recent years, millions of aliens demonstrated nationwide in support of amnesty for illegal immigrants. "Millions of people marched in the streets on behalf of immigrants in what seemed to be an almost spontaneous, yet peaceful uprising for workers." Gabriela D. Lemus, "The Latino Vote," *Point of View*, AFL-CIO, *available at* http://www.aflcio.org/mediacenter/speakout/gabriela_d_lemus.cfm. A recurring theme of these demonstrations was "Today we march, tomorrow we vote." *Id.*

Such exhortations may reflect laudable sentiment toward encouraging legitimate votes by those who support immigrants rights. Nevertheless, as shown above, in the recent past, many non-citizens have been encouraged to vote illegally.

These two trends – voter fraud generally and voter fraud by non-citizens – will likely move together. As recent public street demonstrations and the Busby campaign volunteer indicate, there is a growing movement to motivate immigrants to vote. There will similarly be those who want to abuse the voting registration and voting procedures, as did Hermandad Mexicano Nacional, for money or power.

CONCLUSION

Amicus therefore respectfully urges the Court to affirm the decision below.

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